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**NLRB FINDS UNION PHOTOGRAPHING OF EMPLOYEES DURING ORGANIZING
ACTIVITIES OBJECTIONABLE AND ORDERS SECOND ELECTION**

The National Labor Relations Board (Board), in a 3-2 decision involving Randell Warehouse of Arizona, found that Sheet Metal Workers Local 359 (Union) engaged in objectionable conduct when its agents photographed employees during the Union's distribution of campaign literature.

The Board found that employees have a right to accept or not accept the Union's literature, and that photographing them as they make that choice would reasonably be coercive. The Union did not provide the employees with any legitimate justification for the photographing. Thus, the Board found that the Union's conduct tended to interfere with employee free choice in the election, and directed that a second election be held. The majority opinion is signed by Chairman Robert J. Battista and Members Peter C. Schaumber and Peter N. Kirsanow. Members Wilma B. Liebman and Dennis P. Walsh dissented. The decision is posted on the Board's website at www.nlr.gov.

In a prior decision (*Randell I*), the Board found that the photographing was not objectionable because it was not accompanied by other coercive conduct. In that decision, the Board overruled precedent which had held that union photographing was objectionable even if it was not accompanied by other coercive conduct. The Board there retained the rule that employer photographing was presumptively coercive, even if it was not accompanied by other coercion.

The D.C. Circuit Court of Appeals did not agree with the Board. The court noted that the Board had not dealt adequately with its prior decision in *Mike Yurosek*, 292 NLRB 1074 (1989). The court remanded for "further consideration and a reasoned opinion." The court did not preclude the Board from overturning precedent so as to clarify Board law.

Upon reconsideration, the majority in *Randell II* concluded that the *Randell I* rationale for the different standards for employees and unions could not withstand careful scrutiny. The majority stated:

The rationale for finding that unexplained photographing has a reasonable tendency to interfere with employee free choice applies regardless of whether the

party engaged in such conduct is a union or an employer. Thus, the disparate treatment embraced by the *Randell I* Board cannot be squared with the Act's fundamental principles.

The decision stated:

In the context of an election campaign, the union seeks to become (or remain) the representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer's solicitation to reject union representation.

Accordingly, the Board overruled *Randell I* and found that:

[I]n the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.

Applying that principle, the majority concluded that:

[T]he Union engaged in objectionable conduct by photographing employees as they were being offered literature by Union representatives. For the reasons explained above, such photographing is presumptively coercive. Moreover, the Union did not adequately explain its purpose for the photographing. The one explanation offered to a single employee — "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run" — was ambiguous at best. It did not establish a legitimate justification for the photographing. Accordingly, the photographing reasonably tended to interfere with employee free choice, and the election must be set aside.

In dissent, Members Liebman and Walsh disagreed with the majority's overruling of *Randell I* and stated they would adhere to the Board's original decision. They noted, first, that the D.C. Circuit remanded the case to the Board for the limited purpose of considering whether certain allegedly coercive conduct by pro-union employees made the union's photographing objectionable, and thus it was unnecessary for the majority to reach out and overrule the Board's original decision. The dissent contended further that the majority failed to grasp the "very different positions that unions and employers occupy with respect to employees, in terms of campaign access, economic relationship, and potential for coercion," as well as the legitimate interests that unions have in photographing employees in order to gauge and record their interests in organizing.

The dissent found that employers are in a far more effective position to coerce employees than unions are, stating:

To point out the obvious, employees are economically dependent on the employer, who controls every aspect of their working lives. The employer may fire workers, discipline them, impose harsher working conditions, cut their pay, and deny them benefits.

The dissent also contended employees likely will recognize the union's legitimate interest in photographing, in the absence of any coercive union conduct that would raise suspicion, even if the union does not provide employees with an explanation.

The dissent defended the *Randell I* rationale for applying a different standard to union and employer photographing, stating:

Recognizing that the realities of the workplace bear differently on employers and on unions is not disparate treatment; it is common sense and fidelity to the Act. Our original decision in this case was correct. Today's decision, in contrast, is arbitrary both in failing to see the difference between union photographing and employer photographing and in failing to see the similarity between union photographing and other, permissible organizing tools. The result places unions in a dilemma: Photographing employees is objectionable, unless a legitimate justification is communicated to the employees, but the majority implies that a central justification for photographing employees, to identify supporters and potential supporters of the union, is inherently coercive. In light of its internal contradictions, we do not see how the majority's decision can stand.

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